IN THE HIGH COURT OF JUDICATURE AT BOMBAY

O. O. C. J.

WRIT PETITION NO.2049 OF 2003

Lionel Edward & India Steamship
Employees Union ..Petitioner.

Vs.

India Steamship Company Ltd. & Ors. ..Respondents.

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Mr. M.M. Verma with Mr. Rajesh Gehani for the Petitioner.
Mr. P. Ramaswamy with Mr. Neel Helekar for Respondent Nos.1, 2 and 4.
Mr. Santosh Shetty with Mr. T.S. Shetty for Respondent No.3.

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CORAM: DR. D.Y. CHANDRACHUD, J.

28th August, 2006.

ORAL JUDGMENT :

1. These proceedings under Article 226 of the Constitution arise out of the dismissal of a complaint under items 1(b) and 1(d) of Schedule IV of the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971.

2. The complaint before the Labour Court originated in a notice of closure that was issued by the Second Respondent on 7th February, 1992. By its notice, the management intimated its decision to close down its Mumbai office situated at 41, R.K. Marg,

Ballard Estate, inter alia on account of 'heavy losses' and 'uneconomic future for liner services' which constituted the main work handled by that office. 37 employees were engaged in the office at Ballard Estate and they were informed that individual notices together with the closure compensation and other legal dues were being dispatched. It is an admitted position that accordingly closure compensation together with all the terminal dues came to be paid to the workmen under Section 25FFF of the Industrial Disputes Act, 1947.

3. The Petitioner union filed a complaint of unfair labour practices under items 1(b) and 1(d) of Schedule IV contending that the employer had discharged or dismissed the employees “not in good faith, but in the colourable exercise of the employer's rights” and for “patently false reasons”. The contention of the union in the complaint of unfair labour practices was that the activities of the Second Respondent which is a shipping company were progressing well with major business activities concentrated in Ports situated on the Arabian Sea Coast. The Union relied upon news reports from financial and investment journals adverting to the financial progress made by the company. The contention of

the Union was that though the notice of closure stated that the company was incurring heavy losses at its Bombay office, this was contrary to public perception as reported in the trade. Moreover it was submitted that after the alleged closure the business activities which were to be carried out by the Bombay office were got done by the Second Respondent through the Third Respondent to the complaint. The Third Respondent to the complaint was a company by the name of Sea Bridge Maritime Agency Private Limited. The managerial staff, according to the union had been continued after the date of the closure. The union submitted that the act of closure was malafide.

4. The Management filed its written statement setting out that the Bombay office came to be closed on account of continuing losses and an uneconomic future for liner services which constituted the main work handled by that office. According to the management, the liner ships that were operated by the company were confined to break-bulk cargo. Keeping in tune with the global trend, India's sea borne liner trade was according to the management being carried out by container vessels. As a result, in the previous years prior to the closure an increasing number of

categories of break bulk cargo were being considered for containerisation. This process according to the management was hastened by political changes internationally including those associated with the break down of the erstwhile USSR. According to the management, with the decline in liner trade some of its vessels were kept in operation but the Bombay office was now left with no work to handle, consequent upon a reduction in the number of vessels calling at Bombay Port.

5. Evidence was adduced on behalf of the workmen as well as the management. The Industrial Court by its order dated 31st October, 2002 dismissed the complaint. The Industrial Court, it may be noted, has also held that the appropriate government in the case of the Second Respondent is the Central Government and that consequently the complaint under the Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act, 1971 was not maintainable. Though the learned counsel appearing for the contesting parties have briefly addressed the Court on the maintainability of the complaint, Counsel fairly stated that should this Court hold that the complaint was lacking in merits, the issue of maintainability would be

academic and need not be determined. Accordingly, Counsel addressed the Court at some length on the merits of the complaint. Having come to the conclusion that the complaint was lacking in merit and was therefore liable to be dismissed, it is not necessary for this Court in that view of the matter to enter any final decision on the question as to whether the appropriate government in respect of the Second Respondent was the Central Government under Section 2(a) of the Industrial Disputes Act, 1947.

6. On behalf of the Petitioner it has been submitted that in the present case a charter of demands had been submitted by the Union, which was pending. Meetings were held on 14th and 15th May, 1991 and on 8th October, 1991. The management addressed a letter to the union recording that a large part of the demand for revision of wages was resolved and that as a matter of fact the only outstanding issue that remained to be sorted out prior to formulating a settlement was the issue of gratuity. The contention of the Petitioner was that instead of taking the process to its logical conclusion by arriving at a settlement, the employer decided to close the business undertaking at Mumbai and thereupon the entire activities came to be handed over to the Third Respondent.

On this basis, it was submitted that the discharge or dismissal of the employees was within the meaning of item 1(b) of Schedule IV not in good faith but in colourable exercise of the employer's rights and within the meaning of item 1(d) for patently false reasons.

7. While considering the tenability of the submissions which have been urged on behalf of the Petitioner, it would be necessary to note that the Industrial Disputes Act, 1947 came to be amended by Act 46 of 1982 to insert a statutory definition of the expression 'closure'. 'Closure' has been defined to mean the permanent closing down of a place of employment or a part thereof. Chapters VA and VB govern the right of the employer to effect a closure by subjecting that right to the observance of certain conditions. In the present case, it is not disputed that the total number of employees in the Bombay branch office was 37 and that consequently Chapter VB has no application. Chapter VA, therefore, regulates the question of closure in this case. Sub section (1) of Section 25FFF postulates that where an undertaking is closed down **for any reason whatsoever**, every workman who has been in continuous service for not less than one year in that undertaking immediately before such closure shall, subject to the

provisions of sub-section (2), be entitled to notice and compensation in accordance with the provisions of section 25F, as if the workman had been retrenched. The proviso to sub-section (1) deals with a situation where an undertaking is closed down on account of unavoidable circumstances beyond the control of the employer. The provisio has no application to the facts of this case. In the present case, it has not been disputed that each one of the workmen was at the time of the closure paid closure compensation in accordance with Section 25FFF. In the course of his evidence, the first witness who deposed on behalf of the workmen (Mr. M. Britto) admitted that he had received his legal dues such as gratuity, notice pay, retrenchment compensation and leave salary. Before this Court it has been fairly admitted that this was the factual position which governs all the 37 employees. Now in this background it would be necessary to advert to the decision of the Supreme Court in **Kalinga Tubes Ltd. and Their Workmen**[1]. The Industrial Tribunal had in that case dwelt upon the profitability of the business of the employer and the profits which had been made, for the purposes of assessing the circumstances of the closure. Holding that this was an extraneous and irrelevant

1 1969 I LLJ 557.

circumstance, the Supreme Court held as follows :

> "So far as the present case is concerned the tribunal travelled into an extraneous and irrelevant field when it took into account the profitable business which the company was doing and the profits which it was making or was expected to make. The tribunal was apparently labouring under the impression that according to certain judicial decisions there can be a closure of an undertaking only when there are financial difficulties and the undertaking becomes a losing concern. It is difficult, and indeed no such principle entrenched in industrial law has been brought to our notice to accept that the closure of an undertaking can be limited or restricted only to financial, economic or other considerations of a like nature."

The Supreme Court held that the closure has to be genuine and bonafide in the sense that it is a closure in fact and not a mere pretence of a closure. Following the earlier decision of the Court in **Indian Hume Pipe Company Ltd. v. their workmen**[2] the Supreme Court held that it was emphasised in that decision that the expression "bona fide" used in certain decisions of the Court did not refer to the motive behind the closure but to the fact of closure. The Supreme Court held as follows :

> "The discussion of the above decisions yields the result that the entire set of circumstances and facts have to be taken into account while endeavouring to find out if, in fact, there has been a closure and the tribunal or the court is not confined to any particular fact or set of facts

2 1969 I LLJ 242.

> or circumstances. In one case the management may decide to close down an undertaking because of financial or purely business reasons. In another case it may decide in favour of closure when faced with a situation in which it is considered either dangerous or hazardous from the point of view of the safety of the administrative staff or members of the management or even the employees themselves to carry on the business. The essence of the matter, therefore, is the factum of closure by whatever reasons motivated." (emphasis supplied).

8. The contention of the workmen was that the business of the company was continuing after the closure of the Bombay branch and that the business was being carried on by Sea Bridge Maritime Agency Pvt. Ltd., the Third Respondent to the complaint. The first witness for the workmen (Mr. M. Britto) deposed that he came to know the names of the officers of the management whose services were not terminated after the closure. However, in the course of his cross examination the witness admitted that he was unaware whether the aforesaid persons had either resigned or had been removed from the company. The witness admitted that the Third Respondent did not belong to the management of the Second Respondent. The second witness who deposed on behalf of the workmen (Mr. Ramamurthy) specifically admitted in the course of his cross examination that he could not say as to whether

officers who had left the Second Respondent had joined the Third Respondent. He then admitted that six of the named officers of the Second Respondent were in fact not working with the Third Respondent. The witness in the course of his cross examination admitted that the First Respondent was a shipping company and not a clearing and forwarding agent. The Memorandum and Articles of Association of the Third Respondent came to be produced by the witness during the course of cross examination. The witness was unable to state whether the Third Respondent was a clearing and forwarding agent, ostensibly for the reason that he had not perused the documents. In so far as the evidence of the management is concerned, two witnesses stepped into the witness box. The first witness was the Company Secretary and General Manager in charge of Personnel and Administration while the second witness was the General Manager in charge of Commercial Services since 1989. During the course of the deposition of the second witness, it emerged that at or about the time when the Bombay branch office was closed in February 1992, the number of ships that had called at Bombay Port during 1991-92 were 18. The number fell in 1992-93 to 8; in 1993-94 to 1 and finally in 1994-95 none of the ships of the management called at

Bombay Port. The witness explained the circumstances in which there was a decline in liner services.

9. On this state of the evidence, it cannot be said that the closure was a mere pretence and that there was no closure in fact. There is no evidence to establish that the business which was being carried on by the Bombay branch office continued to be carried on by the Third Respondent. On behalf of the Petitioner, reliance was sought to be placed on the statement of the total number of ships of the Second Respondent that had called at Bombay Port during the year 1992. On the other hand, it has been submitted on behalf of the Second Respondent that the Petitioner did not seek the production of any records for the years subsequent thereto, which would have affirmed the correctness of the position stated by the General Manager, Commercial Services that there was a precipitate decline in the vessels of the management that had called at Bombay Port on and after the closure of the Bombay Office. The material on the record is sufficient to sustain the finding of the Tribunal that there is a closure in fact. Once the Tribunal has taken a view based on the evidence on the record, this Court would not have been justified in

substituting its own perception for the finding arrived at by the fact finding body. Once the factum of closure is established the surviving question was whether the conditions requisite for effecting the closure of the undertaking under Section 25FFF had been duly complied with. As a matter of fact, compliance of Section 25FFF has not been disputed. The closure was in accordance with the provisions of Section 25FFF of the Industrial Disputes Act, 1947. There is no evidence to establish that the discharge or dismissal of the employees in the present case was not in good faith, but in colourable exercise of the employer's rights or for patently false reasons within the meaning of items 1(b) and (d) of Schedule IV.

10. The dismissal of the complaint by the Tribunal therefore has to be sustained on merits. Hence, it is not necessary for this Court to enter a finding in regard to the maintainability of the complaint with reference to the meaning of the expression 'appropriate government' under section 2(a) of the Industrial Disputes Act, 1947. The Petition shall accordingly stand dismissed. There shall be no order as to costs.